

### **REMARKS/ARGUMENTS**

Applicants have carefully reviewed the Office Action mailed on June 9, 2009. Applicants respectfully traverse all objections, rejections, and assertions made by the Examiner. Claims 1, 4, 5, 9, 13-16, and 21-27 have been amended, claims 8, 10-12, 17, 18, 28, 29, 31, and 32 have been canceled, and new claims 33 and 34 have been added. Support for the amendments and new claims is found in the specification, claims, and drawings as originally filed at, for example, paragraphs 65, 70, 132-14, and in Figures 4, 38-40, and 43-47. No new matter has been added. Reconsideration and allowance of all pending claims is respectfully requested.

#### **Claim Rejections under 35 U.S.C. § 112, first paragraph**

Claims 1-22 and 31-32 are rejected as failing to comply with the written description requirement for reciting “inclining said access device.” Applicants do not concede the correctness of the rejection, however, in the interest of advancing prosecution, the phrase has been removed from the claims. Reconsideration and withdrawal of the rejection are respectfully requested.

#### **Claim Rejections under 35 U.S.C §103**

Claims 1-4, 6-12, 14-18, and 23-32 were rejected under 35 U.S.C. §103(a) as being unpatentable over Cornwall et al. (U.S. Patent No. 6,485,518) in view of Davison (U.S. Patent No. 6,530,926). This rejection is respectfully traversed.

Independent claim 1, as amended, recites:

1. (Currently Amended) A method of fixing adjoining vertebrae of the spine of a patient, comprising:
  - inserting into said patient a single access device to a surgical location adjacent the spine with said access device in a first configuration having a first cross-sectional area at a distal portion thereof, said access device having a proximal portion pivotably attached to a distal portion;
  - actuating said access device to a second configuration having an enlarged cross-sectional area at said distal portion thereof, such that said distal portion provides access to two or more facet joints;
  - delivering a first fastener through the access device to the surgical location;

advancing said first fastener through a first vertebra and into a second vertebra through a first facet joint;  
pivoting the proximal portion of said access device relative to the distal portion to change the angle of the access device to facilitate insertion of a second fastener;  
delivering said second fastener through said access device to the surgical location; and  
advancing said second fastener through said first vertebra and into said second vertebra through a second facet joint.

Neither Cornwall et al. nor Davison appear to teach or suggest such specific method steps. Cornwall et al. teaches a single cannula method for transfacet fixation in which fasteners are inserted individually through a cannula fixed to a support frame. See Fig. 4. The Examiner acknowledges that Cornwall et al. fail to teach inserting an access device or inserting multiple fasteners. The Examiner cites Davison for teaching percutaneous access device methods and asserts that it would have been obvious to perform the method of Cornwall et al. using the access device of Davison to have improved access to the spinal area and for inserting multiple screws. Applicants respectfully disagree.

Cornwall et al. teach using an external guideframe 70 having a cannula 72 positionable back and forth and rotatable on the guideframe 70, for insertion of the facet screws 30. See FIG. 4 and column 7, lines 9-29. Cornwall et al. teach the guideframe and attached cannula as facilitating the angled insertion of the facet screws. While Davison appears to teach a cannula for inserting fasteners into first and second vertebrae and fixation elements connecting the fasteners, as shown in FIGS. 24-25, Davison do not appear to teach or suggest anything regarding the specific method steps recited in the claims. Thus, even if one were to combine Cornwall et al. and Davison, one would not arrive at the specific method steps recited in independent claim 1 and the claims dependent thereon. Further, there is no motivation for one of ordinary skill in the art to modify Cornwall et al. and/or Davison to achieve the claimed steps.

Additionally, Cornwall appears to teach a preferred method and system involving inserting 2 facet screws, where each screw is inserted through a separate narrow cannula at a specific angle through two vertebra. It would appear that if an enlarged/expandable elongate body, as discussed in Davidson, were used in the method disclosed in Cornwall, it would

defeat the purpose of Cornwall's specifically oriented guideframes that orient narrow cannulae to deliver narrow implants to specific locations at specific orientations. In other words, Cornwall thus appears to teach away from replacing their narrow cannula in the facet screw placement procedure with the enlarged/expandable elongate body of Davidson.

Regarding independent claims 14, 23, and 27, Cornwall et al. and Davison fail to teach or suggest the specific method steps recited for at least the reasons set forth above.

Reconsideration and withdrawal of the rejection are respectfully requested.

Claims 5 and 13 were rejected under 35 U.S.C. §103(a) as being unpatentable over R Cornwall et al. (U.S. Patent No. 6,485,518) and Davison (U.S. Patent No. 6,530,926) as applied to claims 1 and 8, respectively above, and further in view of Neubardt (U.S. Patent No. 5,196,015). This rejection is respectfully traversed. As discussed above, there is no motivation for one of ordinary skill in the art to combine Davison and Cornwall, and even if such a combination were made, the elements of independent claim 1, from which claims 5 and 13 depend, are not taught or suggested. Naubardt does not appear to provide what Davison and Cornwall lack. Naubardt does not appear to provide any motivation or suggestion for modifying Davison and/or Cornwall to achieve the method steps recited in independent claim 1, or dependent claims 5 and 13. Reconsideration and withdrawal of the rejection are respectfully requested.

Claims 19-20 and 21-22 were rejected under 35 U.S.C. §103(a) as being unpatentable over the combination of Cornwall et al. (U.S. Patent No. 6,485,518) and Davison (U.S. Patent No. 6,530,926). This rejection is respectfully traversed. For at least the reasons set forth above, Cornwall et al. and Davison do not appear to teach or suggest the elements of independent claims 1 and 14, from which claims 19-20, and 21-22 depend, respectively. There is no motivation for one of ordinary skill in the art to further modify Cornwall et al. and/or Davison to achieve the specific method steps recited in claims 19-22. Reconsideration and withdrawal of the rejections are respectfully requested.

**CONCLUSION**

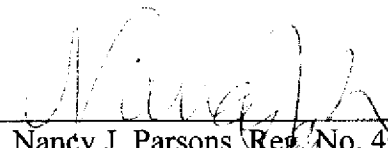
Reexamination and reconsideration are respectfully requested. It is respectfully submitted that the claims are now in condition for allowance. Issuance of a Notice of Allowance in due course is requested. If a telephone conference might be of assistance, please contact the undersigned attorney at (612) 767-4574.

Respectfully submitted,

Gene DIPOTO et al.

By their attorney,

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